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MEMORANDUM OF LAW

DATE: March 24, 2017
TO: Councilmember David Alvarez
FROM: City Attorney
SUBJECT: Location of Public Art Paid for with Water Utility Funds

INTRODUCTION

Council Policy 900-11 generally provides that two percent of the cost of City construction projects will be set aside to fund public art. By memorandum dated January 24, 2017, you have asked whether the policy allows public art to be placed at a location other than the project site if a project is funded by water utility funds and the art will otherwise be mostly inaccessible to the general public. Your memorandum references an article in the Voice of San Diego entitled *The City Might Not Have To Put Public Art In Not-So-Public Places After All* that questions whether the City must place the public art component of two Public Utility Department projects at the project sites. Your memorandum also asks whether the funding sources for the two water facilities or future water projects prohibit the City from placing the art at a more publicly accessible locations.

QUESTIONS PRESENTED

1. Does Council Policy 900-11 require public art to be placed at the project site if the project is funded by water utility funds?
2. Do the funding sources for the North City Advanced Water Purification Facility, the Chollas Water Operations Facility, or future water projects allow the City to place the public art at an offsite location?

SHORT ANSWERS

1. Yes, Council Policy 900-11 requires public art funded in whole or in part by water utility funds to be placed at the project site. The purpose behind this restriction is compliance with Proposition 218, so waiving the Council Policy will only allow the placement of artwork offsite when consistent with legal restrictions on the use of water utility funds.

2. It depends on why the public art is being placed offsite. Placing public art paid for with water utility funds at locations other than water facilities to make the artwork more accessible to the public risks violating Proposition 218. Placing public art offsite may be permissible if there is a nexus between the artwork and providing water service, such as educating the public about water conservation, but water conservation cannot be used as a pretext for art projects whose purpose is to benefit the general public.

ANALYSIS

I. Council Policy 900-11 requires public art funded in whole or in part by water utility funds to be placed at the project site.

Council Policy requires the City Manager to “recommend annually that the City’s public art program be funded by 2% of eligible construction projects with eligible project funds in excess of \$250,000.” Council Policy 900-11. An “eligible construction project” is:

[A]ny CIP project paid for wholly by the City, or other public improvement project paid for wholly by the Redevelopment Agency, for the construction of any building, park, median, bridge, transit or aviation facility, trail, parking facility, or above-grade utility, *to which the public has access or which is visible from a public right-of-way.*

Id. (emphasis added).

The intent of the Council Policy is to place public art where it can be visited by the public, or at least seen from a public street. “A work of public art shall not be located at or near any publicly owned facility to which the public is denied access due to security concerns or for any other reason.” *Id.* Water facilities are not accessible to the public to the same degree as public parks or libraries, but many are still accessible to water customers or others doing business with the City, or through guided tours. Our understanding is that the City’s practice has been to include public art at water facilities as long as there is some level of public access or view.

Council Policy 900-11 requires public art paid for with any water utility funds to be located at the project site. “Where a CIP project is financed in whole or in part by restricted funding sources such as enterprise funds, loans, or grants, the public art program allocation which is authorized by the City Council shall be expended only on works of public art placed at the project site.” *Id.* Water utility funds are enterprise funds. 2006 City Att’y MOL 54 (2006-6; Mar. 16, 2006). Water utility funds are those from any source of revenue of the water utility, including grants, loans and bonds where the water utility fund is the dedicated source for repayment. San Diego Charter §§ 53, 90.1; 2010 City Att’y Report 489 (2010-6; Feb. 24, 2010). To our knowledge, construction of all City water facilities is paid for with water utility funds, thereby restricting any public art to the particular project sites pursuant to Council Policy.

The purpose of this restriction on the placement of public art is compliance with Proposition 218, discussed below, which restricts the use of water utility funds. Waiving the

Council Policy will only allow the placement of artwork offsite when consistent with legal restrictions on the use of water utility funds.

II. Placing public art paid for with water utility funds at locations other than water facilities risks violating Proposition 218.

Proposition 218 amended the California Constitution in 1996 by adding articles XIII C and XIII D. Section 6 of article XIII D imposed new requirements for new and existing property-related fees and charges. These requirements include a restriction that “[n]o fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners.” Cal. Const. art. XIII D, § 6(b)(5). Charges for water delivered to property owners and residents are property-related fees subject to this restriction. *Bighorn-Desert View Water Agency v. Verjil*, 39 Cal. 4th 205, 217 (2006). Proposition 218 is intended to prohibit diverting ratepayer funds to pay for unrelated projects or services. 2008 City Att’y MOL 92 (2008-12; Aug. 4, 2008).

Water utility funds may only be used for purposes related to the City’s water system. 2013 City Att’y MOL 8 (2013-1; Jan. 14, 2013). Revenue from water bonds and loans is considered to be water utility funds because these types of financing rely solely on water ratepayers for repayment. *See Amended and Restated Master Installment Purchase Agreement*, §5.02 (Jan. 1, 2009); San Diego Ordinance O-20635 (Apr. 5, 2016) [dedicating water utility funds for repayment of water bonds]; San Diego Ordinance O-20387 (July 17, 2014) [dedicating water utility funds for repayment of a State Revolving Fund loan]. Our understanding is that the North City Advanced Water Purification Facility and the Chollas Water Operations Facility are being funded solely with water utility funds, either through water bonds, loans, available cash or some combination thereof.

This Office has issued many opinions over the years explaining that there must be a “factual nexus” between the expenditure of water utility funds and the construction, operation, or maintenance of the City’s water system. *See* 2010 City Att’y Report 489 (2010-6; Feb. 24, 2010). The less related a project is to providing water service, the more likely it is that spending ratepayer money on the project is improper. However, there is nothing in the law that specifically says water projects cannot include artwork. Nor is there anything in the law that says artwork at water facilities must be associated with a capital improvement project. There are no published court opinions in California addressing public art paid for with ratepayer funds in the context of Proposition 218.

There is a published opinion from the State of Washington that is instructive. Washington law has restrictions on the use of ratepayer funds similar to the restrictions imposed by Proposition 218. In *Okeson v. City of Seattle*, 130 Wash. App. 814 (2005), electricity ratepayers challenged Seattle’s ordinance that allocated one percent of the budget for capital construction projects towards public art. Seattle is a charter city under the laws of Washington that operates a municipal electric utility. Under Washington law, the activity of a municipal electric utility must bear “a sufficiently close nexus” to the purpose of supplying electricity to its inhabitants. *Id.* at 822. The appellate court affirmed the trial court’s ruling that ratepayer-funded art on display at

the utility's facilities and offices was allowed because "[s]uch projects beautify employee workspaces and customer service areas and thereby helped increase the efficiency of workplace operations and acted to the benefit of [the electric utility]." *Id.* at 823-824. The court rejected the general placement of ratepayer-funded art at offsite locations because "[s]uch projects provide a general benefit to the public at large," not the electric utility. *Id.* at 824. The court also held that ratepayers could fund public art projects "that furthered conservation education," but that conservation education could not be used "as a pretext for art projects whose purpose was to benefit the general public." *Id.*

The *Okeson* decision is not binding on California courts, but the case is so similar to the issue at hand, it is a good indication of how Proposition 218 applies to public art. Both Seattle and the City are prohibited from spending ratepayer money on services that benefit the general public in the same manner as ratepayers. The *Okeson* decision holds that placing ratepayer-funded artwork off of utility property violates this restriction if the purpose is to benefit the general public. If the City were to place public art funded by water ratepayers away from water facilities to make them more accessible to the public, the factual nexus with the construction, operation, or maintenance of the water system would likely be severed and violate Proposition 218. The City may be able to place water ratepayer-funded artwork offsite if the purpose of the artwork is to promote water conservation because there is a clear nexus between water service and water conservation.

CONCLUSION

Council Policy 900-11 requires public art funded in whole or in part by water utility funds to be placed at the project site. This requirement is consistent with Proposition 218, which prohibits using ratepayer money for governmental services that are available to the public at large in substantially the same manner as it is to ratepayers. Revenue from water bonds and loans is considered ratepayer money subject to this restriction because these types of financing rely solely on water ratepayers for repayment. Placing public art paid for with water utility funds at locations other than water facilities to make it more accessible to the public risks violating Proposition 218, unless there is a factual nexus between the artwork and providing water service, such as promoting water conservation. We caution that there are no published opinions in California regarding the funding of public art through ratepayer funds under Proposition 218, and the opinion from Washington State we are relying on, while very similar, is not binding on California courts.

Sincerely,

MARA W. ELLIOTT, City Attorney

By */s/ Thomas C. Zeleny*
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TCZ:ac

cc: Independent Budget Analyst

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